

CM Power Electrical Engineering Sdn Bhd v Sediabena Sdn Bhd A

HIGH COURT (SHAH ALAM) — WRIT SUMMON NO 22-922 OF 2010 B
SEE MEE CHUN J
28 MARCH 2014

Contract — Breach — Supply of goods and services — Whether plaintiff completed works as claimed and entitled to full payment — Whether agreed term for payment of liquidated damages for delay in completion existed between the parties C

The plaintiff sued the defendant for RM504,304.20 as the balance sum owing for goods delivered and services rendered in connection with the construction, installation and commissioning of a telecommunication base transceiver station. The defendant had subcontracted part of the work on that project to the plaintiff. The defendant denied the plaintiff's claim saying the work done was less than what was claimed. Out of the RM116,630 the defendant counterclaimed for rental of machinery and equipment and liquidated damages for delay, the plaintiff conceded that the defendant had incurred a sum of RM2,830 for rental of crane and skylift. D

Held, allowing the plaintiff's claim for RM501,474.20 and dismissing the counterclaim: F

- (1) The evidence showed the plaintiff had completed the work as claimed thereby entitling it to be paid. The court found the terms of payment was 60% and 40% as agreed in an email between the parties and not 60%, 30% and 10% as was contended by the defendant (see paras 3, 20 & 24). G
- (2) The court found there was no agreed term for liquidated damages between the parties and as such it could not be imposed (see para 31). H

[Bahasa Malaysia summary]

Plaintif menyaman defendan untuk wang sejumlah RM504,304.20 sebagai baki jumlah yang terhutang bagi barangan yang dihantar dan perkhidmatan yang diberikan berkaitan dengan pembinaan, pemasangan dan melengkapkan stesen penerimaan asas telekomunikasi. Defendan telah memberikan sebahagian kerja secara subkontrak atas projek tersebut kepada plaintiff. Defendan menafikan tuntutan plaintiff dengan menyatakan kerja yang dilakukan kurang daripada apa yang dituntut. Daripada RM116,630 defendan menuntut balas untuk sewa mesin dan kelengkapan dan ganti rugi I

A ditetapkan kerana kelewatan, plaintif bersetuju bahawa defendan telah menanggung sejumlah RM2,830 untuk sewa kren dan skylift.

Diputuskan, membenarkan tuntutan plaintif untuk sejumlah RM501,474.20 dan menolak tuntutan balas:

- B (1) Keterangan menunjukkan plaintif telah menyiapkan kerja seperti yang dituntut dengan itu memberikannya hak untuk dibayar. Mahkamah mendapati terma-terma bayaran adalah 60% dan 40% seperti yang dipersetujui di dalam e-mel antara pihak-pihak dan bukan 60%, 30% dan 10% seperti yang diujahkan oleh defendan (lihat perenggan 3, 20 & 24).
- C (2) Mahkamah mendapati tidak terdapat terma yang dipersetujui untuk ganti rugi yang ditetapkan antara pihak-pihak dan dengan itu ia tidak dapat dikenakan (lihat perenggan 31).]

D **Notes**

For a case on supply of goods and services, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3428.

E **Cases referred to**

Forward Resources and Construction Sdn Bhd v CCS Comservice (Malaysia) Sdn Bhd (22NcVc 960-08 of 2012 KLHC) (unreported), HC (refd)

Sukanathan M Pasupathy (Sukanathan Mizuraini) for the plintiff.

F *Ang Kek Loone (Ang Beng Hoe & Co) for the defendant.*

See Mee Chun J:

- G [1] This is the plaintiff's claim for the balance price of various goods and services provided to defendant in connection with a project known as 'Maxis BTS Project-Construction of Base Transceiver Station Installation and Commissioning of Antenna and Feeder System and Other Ancillary Services for Base Transceiver Station' ('the project'). Maxis Broadband Sdn Bhd ('Maxis') had appointed the defendant as contractor for the project. The defendant in turn appointed the plaintiff as subcontractor for part of the project. The plaintiff's claim is it had carried out works totaling RM1,020,791.14. After taking into account payments by the defendant of RM409,282.24 and credit notes issued of RM107,204.70 the balance due is RM504,304.20. The defendant denies the claim as the work done was less than
- H what was claimed and counterclaims for rental of machinery and equipment and liquidated damages for late installation.
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[2] The plaintiff had three witnesses Rajinkanth a/l Varathrajoo ('PW1', finance manager and witness statement marked as WSP1), Pathmaraj a/l KR

Eithurajoo ('PW2', the defendant's project manager in 2008 and witness statement marked as WSP2) and Chandran a/l Periasamy ('PW3', director). The defendant had four witnesses Low Yeow Joo ('DW1', project director and witness statement marked as WSD1), Murugan a/l Mokmudac Veran ('DW2', project engineer and witness statement marked as WSD2), Nur Faezah bt Abdul Hamid ('DW3', quantity surveyor and witness statement marked as WSD3) and Chew Wai Choy ('DW4', director and witness statement marked as WSD4).

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[3] Although the issues to be tried as in 'G' are many, the primary issue is whether the plaintiff had completed the work as claimed thereby entitling it to be paid.

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[4] From the agreed facts in 'F' the work flow can be summarised as — the defendant issues PO; the plaintiff commences work; the plaintiff completes work and handovers site to the defendant; the plaintiff invoices the defendant for the amount stated in PO. It was also agreed in para 7 'that where stated in defendant's POs, plaintiff agreed to final measurement of their works to be determined and approved by Maxis/Sediabena via the issuance of a document known as Checklist'. The work flow then continues with 'Maxis will then request for a joint commissioning where a final measurement will conducted to determine the amount or quantity of work done by the plaintiff to be recorded in the final commission checklist and Maxis will issue a punchlist (list of defects). When the defects are rectified and site pack completed Maxis will then approve the final commission checklist. As per PW2 a site pack means all documents required by Maxis for submission evidencing the completion of work on a site and it is a folder containing documents. It was also an agreed fact the terms of PO are 'final amount shall be based on final quantity and items supplied approved by Maxis/Sediabena; 'Note items supplied by Sediabena' and 'If no remarks are made within four days from date of PO this PO will be deemed correct and accurate'.

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COMPLETION OF WORK

[5] PW1 stated when work was completed site handover certificates ('SH certificates') are prepared and acknowledged by the defendant as in B1 1–236. PW2 also stated the work was completed as seen from the SH certificates signed by him or one Hafeeza. PW1 was cross-examined as to whether the SH certificates were signed and issued just before the writ was signed to which he said he referred to the dates and he wouldn't know if they had been backdated. On a SH certificate signed on 21 July 2008 by one Hafeeza before she had joined the defendant he said it was possible that it was backdated. He was referred to SH certificate for site RNEK (B1 96) which showed completion on 25 July 2008 and documents submitted on 18 August 2008. He agreed

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- A punchlist report was also submitted. He was then referred to commission checklist in B2 663 which showed the site was commissioned on 27 August 2008 and it was put to him the punchlist will only be issued on that date to which he disagreed as the checklist was between the defendant and Maxis. He disagreed it was impossible for the site to be completed on 18 August 2008.
- B There were questions on other sites along the same vein where the completion and punchlist was cleared earlier and the commissioning came later. In cross-examination PW2 stated no quantity is shown in SH certificates. DW2 evidence was that SH certificates do not mean the work is completed as all defects have to be rectified and they were not. SH certificates also does not
- C mean the plaintiff can claim for the amount stated in the invoice as they do not show the actual quantity of work. They are not part of the transaction between the plaintiff and the defendant as the plaintiff issued them just before the claim was filed and they were backdated. In cross-examination on the backdating and
- D as to whether Hafeeza is dishonest he replied no.

- [6] The SH certificates had been acknowledged by the defendant's workers one of whom was PW2 who was then the defendant's project manager at that relevant time or one Hafeeza. As to whether it had been backdated as some had
- E been signed by Hafeeza before she joined the defendant DW2 stated they were not saying she was dishonest and this meant it is possible she had signed to confirm the work done although it may have been backdated. On the punchlist being cleared earlier than the commissioning date this does not mean there was no completion as per the certificates as the commissioning date is between
- F Maxis and the defendant and has nothing to do with the plaintiff. As to the certificates not being pleaded this is evidence as to completion. The defendant's POs, the certificates and checklists point to the completion of work.

REMEASUREMENT AND CHECKLIST

- G [7] The issues of remeasurement and checklist are now considered in the context of how the plaintiff ought to bill the defendant in its invoice.
- H [8] PW1 stated the practice was that the plaintiff will invoice the defendant after the SH certificates. Not all works required Maxis approval before payment as this depended on the terms of PO. If approval was required the plaintiff had to wait for the checklist. The plaintiff had issued invoices before the checklist as at times it was not informed when remeasurement would be done or it was given the checklist very late. Should the checklist reveal a lesser value the
- I plaintiff will issue a credit note ('CN'). Invoices could not be based on actual measurements as the price is lump sum and not provisional. For works which do not require Maxis approval payment is the lump sum amount as in PO. In cross-examination he agreed it is not stated in PO that the plaintiff can ask for payment based on invoices or after deducting CN. It was PW3 who accepted

the work from the defendant and had agreed to the terms of contract. As to whether the invoices are based on POs he said this depends on the terms and the invoiced amount may be different from the actual work. He stated Maxis approval need not be obtained before payment as this was what the defendant had agreed with Maxis. He agreed Maxis and the defendant will check the plaintiff's work. Measurement of the work is done by the defendant and/or Maxis. The checklist will show Maxis had accepted the final quantity of work. He was referred to para 11.2 of an affidavit affirmed by PW3 dated 7 January 2011 (encl 22) and he stated PW3 had said there was no remeasurement. He stated for some sites there were no remeasurement and for some there were and that was why there was a checklist. PW3 had stated in para 12(b) of encl 22 he had not seen the checklist. PW1 stated he has seen the checklist.

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[9] PW2 stated not all works required Maxis approval and remeasurement, only those specifically stated in PO. Where Maxis approval was not required the price is as in PO. After SH certificates if Maxis approval is required the defendant will hold a joint inspection and measurement with representative from Maxis. Joint measurement means PO is provisional as the material will be remeasured. After remeasurement a check list is issued to the defendant by Maxis and the defendant forwards to the plaintiff. If the site has been invoiced the plaintiff will issue CN to the defendant if remeasurement shows a lesser value. If there are defects the plaintiff will rectify and submit with proof as per punchlist. Only if defects are rectified will joint remeasurement be carried out. He didn't know if check lists for all sites were given. The plaintiff had issued all CN. In cross-examination he stated he left the defendant in 2010. He didn't attend the joint measurement. He doesn't know the amount in PO and check list. He knows the plaintiff had issued CN. He was referred to B1 96 which showed punchlist report and B2 663 which showed punchlist was after joint measurement and he agreed p 96 was wrong. There is no site visit before joint measurement. The punchlist is done by Maxis.

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[10] DW1 evidence was the terms of PO stated 'final amount shall be based on final quantity and items supplied approved by Maxis/Sediabena; 'Note items supplied by Sediabena' and 'If no remarks are made within four days from date of PO this PO will be deemed correct and accurate'. It is a term of PO that the plaintiff's work must first be remeasured. In cross-examination when referred to B1 38, 41, 44, 47, 50, 53, 56, 59, 83, 87, 98, 101, 104, 107, 110, 137, 184, 196, 206 and 207 he said there were no terms on remeasurement. TRX removal did not require valuation by Maxis. Maxis informs the defendant to come for measurement and the defendant informs the plaintiff. There are instances where PO is issued after invoices. He disagreed only Maxis and the defendant attend the joint measurement. He agreed only Maxis and the defendant signs the check list. He disagreed all PO state the amount as lump sum. He was agreed to B1 8, 11, 14–220 and asked whether it was lump sum

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- A he stated p 194 said refer to attached BQ for description of quantity and rate. When asked 'it has L/S and isn't that lump sum' he said yes. He elaborated every PO for non TRX has the detailed bill attached and it is not lump sum. This is the reason for joint measurement. He agreed all PO with BQ attached still states the amount as lump sum. In re-examination he said BQ is prepared based on provisional quantity taken from the drawing and is thus subject to final site measurement. As to why PO in B1 41 did not have the remarks as in other PO he said all PO should have the remarks and it could probably be an instruction from Pathma (PW2) or prepared by a new clerk who did not refer to previous PO. Although LS is inserted there is a subsequent sentence which states to refer to attached BQ for description and detail. LS actually refers to BQ and even if there is LS he is not at liberty to pay the amount stated in PO.
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- [11] DW2 evidence is that the price in PO does not represent what the defendant has to pay. The amount the defendant pays is based on the final measurement and subject to payment terms. Maxis conducts the joint commission with the defendant and the plaintiff.
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- [12] From para 4 of agreed facts it is clear that remeasurement is only required where the PO states so. PW1 and PW2 evidence also establishes that. The term or remark in PO requiring remeasurement is 'final amount shall be based on final quantity and items supplied approved by Maxis/Sediabena'. Although DW1 had said the term for remeasurement is stated in all POs he was referred to a series of POs ie B1 38, 41, 44, 47, 50, 53, 56, 59, 83, 87, 98, 101, 104, 107, 110, 137, 184, 196, 206 and 207 for which he said there were no such term. The explanation the term or remark should be there and all PO must have that term/remark and it was probably due to an instruction from PW2 or prepared by a new clerk who did not follow previous PO is mere speculation. The absence of the term or remark shows that not all work need to be remeasured as further evident by his own evidence that TRX removal did not require valuation by Maxis. DW1 had attempted to say all PO did not state the amount as lump sum but when asked if 'it has L/S and isn't that lump sum' he said yes. Hence it follows if no remeasurement is required the price to be invoiced by the plaintiff will follow that in PO.
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- [13] If there is a remeasurement the outcome will be in a checklist which have been produced in B2 650–729. Although the plaintiff said they were not present at remeasurement and the defendant says the plaintiff was present DW1 had acknowledged the checklist was signed only by Maxis and the defendant. As to PW3's earlier affidavit there was no remeasurement and he had not seen the checklist, the evidence as presented in court shows remeasurement is only required if the PO requires it and not POs have such requirement. PW1 had personal knowledge of the work and he had seen the
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checklist. PW3 evidence-in-chief was only in relation to a letter he signed dated 7 August 2008. He was not cross-examined on the contents of the affidavit.

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CREDIT NOTES

[14] It is the plaintiff's case the total credit notes (CN) issued amount to RM107,204.70. All CN have been issued except for four sites known as RABA, BOSA, TSAH and JUBPM1 for which no checklist was received. The defendant's summary at B1 848 show the checklist amounts for RABA and BOSA to be the same as the invoiced amount. In cross-examination on TSAH site it was put to him it was impossible for it to be completed on 4 March 2009 as the defendant did not receive as built drawings as in B2 559 to which he replied it had been emailed but it was not in the bundle. The plaintiff did not issue any CN for TSAH as there was no checklist. He disagreed the site pack was submitted late as it had been sent earlier by email. In re-examination on the site pack he referred to B2 635 and stated the soft copy had been given and the defendant will use the template to submit to Maxis.

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[15] DW1 in cross-examination stated there is no checklist for TSAH as the job was not completed. He did not know if checklist for RABA was issued. He did not answer on checklist for BOSA and JUBPM. When asked the sites for which work had not been completed he said it was TSAH. He was shown photos in B2 830 the work was completed he replied he would not know if it referred to that site. When referred to B2 808–828 that there were photographs and test reports he said if there is no final check list the site is not completed. He then said there was partial work done on TSAH. When asked which part of TSAH was not completed he said as built drawings were not submitted. B2 806 is the last they requested from the plaintiff. He does not have the first request and disagreed it was not requested until March 2010. He disagreed B2 808 shows the site was completed in December 2008 as there was no acknowledgement from the defendant. There was no request for joint measurement as the job was not completed.

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[16] DW2 refuted the plaintiff's allegation that checklist for five sites were not submitted. TSAH was not completed. The other four sites are for small upgrades/installation/dismantling work and do not require joint commissioning and check list. He was referred to the site report for TSAH in B2 808–833 and said the plaintiff didn't complete because of 'access'. In cross-examination he was referred to an email from the plaintiff dated 25 March 2010 (B2 598) where he stated the plaintiff is asking for checklist. After that date he did not reply. With regard to a document in B1 372 which showed verification on TSAH he replied it did not mean the work was completed as it only meant the material was collected. In re-examination he stated it is not the practice to accept soft copies of as built. As built drawings

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A need not necessarily mean the site is completed and here the site was not completed due to access issues. With reference to B 848 the sites requiring CN are under the column 'remarks'.

B [17] The plaintiff's evidence was that no CN were issued for the four sites in question which had already been invoiced as there were no checklists. In respect of the sites RABA, BOSA and JUBPM1 it was DW2 evidence the sites are for small upgrades/installation/dismantling work and do not require joint commissioning and check list. DW1 was unable to answer whether there were checklists for these sites. There is no issue the work was not done. If follows for C the sites RABA, BOSA and JUBPM1 there were no checklists and the amounts as invoiced per POs stand.

D [18] On TSAH DW1's evidence is there was only partial work done as there was no as build drawings. DW2 said the work was not completed due to access issues. B2 806 shows the defendant had requested as build drawings by email dated 19 October 2010 and 'we want to resolve the site issue by Monday morning. ... forward the particulars immediately'. There is an email at 12.54pm of the same date from P (B2 598) that 'the documents will reach you at lunch time' and another email dated 25 March 2010 from the plaintiff for E final checklist. Since DW2 said there was no reply email after 25 March 2010 it is probable the as build drawings were sent otherwise the defendant would have followed up to ask for them. Further DW2 could not remember if he had received them. The evidence in the form of SH certificate in B1 170 further F shows the completion of work. It may well be that whether or not there was as build drawings is a non issue. This can be seen from the defendant's own evidence where DW1 said if there are no as build there is no completion and DW2 said even if there is as build it did not necessarily mean completion and G the site was not completed due to access issues.

H [19] As there were no checklists in respect of the four sites RABA, BOSA, TSAH and JUBPM1 the plaintiff's invoice as per the respective POs stands. It follows too all CN have been issued as in B1 240–255 for which the total is RM10,204.70.

WHETHER THE PLAINTIFF ENTITLED TO CLAIM

I [20] From the above evidence the plaintiff had done the work. Invoices are issued as per PO and remeasurement is only undertaken if stated so in PO whereupon a checklist is then prepared. If the checklist shows a lesser value the plaintiff will issue CN. PW1 prepared the statement in B2 851 which is a comprehensive list of invoice, PO, checklist status and CN from which it

shows work totaling RM1,020,791.14 and after taking into account payments by the defendant of RM409,282.24 and credit notes issued of RM107,204.70 the balance due is RM504,304.20.

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[21] The case of *Forward Resources and Construction Sdn Bhd v CCS Comservice (Malaysia) Sdn Bhd* (22NcVc 960-08 of 2012 KLHC) was referred to by the defendant. In that case there was a term in PO 'the final quantity shall be subject to final site measurement and acceptance by the customer' for which the customer was Maxis. There the court stated there was no evidence adduced by the plaintiff that Maxis had accepted the final quantity of work done by the plaintiff and that civil handover documents proved the plaintiff had completed the works according to the defendant's instructions since the work was verified and the documents were signed by representatives from the main contractor and Maxis. It was then stated at p 5:

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The Court finds that the Civil Handover Documents can only prove verification of the works completed by the Plaintiff. However they do not prove that the customer, Maxis, had accepted the works in accordance with the terms of the PO. Based on the terms of the POs, it is clear that only the Test Acceptance Certificate ... is the required proof of acceptance by Maxis of the Plaintiff's completed Subcontract works.

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In our instant case the evidence is that Maxis approval is only required where the term in the PO states so and not all POs have such a requirement. Here the plaintiff has shown where Maxis approval is required it had given the necessary checklists and issued CN in appropriate situations.

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[22] In *Forward Resources and Construction Sdn Bhd* the court stated no representative from Maxis had been called to prove the plaintiff had completed the work. Here it is not necessary a representative from Maxis ought to be called as not all sites required Maxis approval and the relevant documents such as SH certificates, POs, and checklists have been produced.

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[23] As to the evidence of PW1 being hearsay PW1 had stated he had personal knowledge of the work done.

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PAYMENT TERMS

[24] According to the plaintiff the payment terms are 60% and 40% as agreed in email dated 21 June 2008 (B2 838). D says it is 60%, 30% and 10% and relies on letter dated 5 August 2009 (B1 256) and also the terms and conditions of its contract with Maxis which it says applies to all subcontractors such as the plaintiff. This letter had been received by the plaintiff who did not object to the terms. The plaintiff says it had objected to that letter by its reply

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- A dated 7 August 2009 (B2 846) which was faxed and attached in email dated 11 August 2009 (B2 850) and a Ms Tan from the defendant's office confirmed receipt of the fax.
- B [25] DW1 was asked in cross-examination whether in June 2008 there was an agreement for new sites the plaintiff would be paid 60% and 40% and he answered that was the plaintiff's request and after final negotiation it was 60%, 30% and 10%. He was referred to the email dated 21 June 2008 and he said the final discussion was 60%, 30% and 10%. There was an email in B2 882 to
- C dispute 60% and 40% and the email did not involve the plaintiff. DW2 in cross-examination stated the date of first invoice as in B1 1 is 30 June 2008 and last invoice in B1 234–235 is 20 May 2009. To a question that the letter of 5 August 2009 was after the invoice he said 'repeated reminder'.
- D [26] DW1 also stated the terms of contract between the plaintiff and the defendant are in B1 264–271 (additional terms and conditions for Maxis subcontractors). The plaintiff as the defendant subcontractor was bound by the terms of the main contract between the defendant and Maxis and he relied on cl 1.3 of additional terms. The payment terms are in cl 4 of main contract.
- E In cross-examination he disagreed the terms of additional terms had not been given to the plaintiff during the contract period. There is no record of it given to the plaintiff. The terms of contract between the defendant and Maxis were not given to the plaintiff but they can read it in the defendant's office. To a
- F question whether the terms in PO incorporate the additional terms he answered the additional terms is part of the letter of award and PO will be referred in contract document.
- G [27] The letter of 5 August 2009 which the defendant seeks to rely on was sent after work had been completed as evident from DW2's evidence the date of first invoice as in B1 1 is 30 June 2008 and last invoice in B1 234–235 is 20 May 2009. Hence that letter cannot be relied on as evidence of the terms. Hence it is not necessary to consider if the plaintiff had objected to it and if the defendant had received their letter of objection. As to the terms of payment
- H being in the additional terms this is between the defendant and Maxis and whether the plaintiff ought to know of it is irrelevant particularly in light of the evidence there was no record of it being given to the plaintiff. Accordingly the terms of payment are 60% and 40% as reflected in email dated 21 June 2008. As to progress claim No 1–8 reflecting terms of payment being 60%, 30% and
- I 10%, progress claim No 1–6 were not produced in court whereas progress claim No 7–8 were only given when the claim was filed.

COUNTERCLAIM

[28] The counterclaim is premised on rental for antenna feeder testing equipment-site master model No S331B (RM28,600), rental for replacement machine as the plaintiff had removed site master model No S331B without permission (RM28,600), rental of crane and skylift (RM2,830) which has been conceded by the plaintiff, liquidated damages for late installation (RM36,600) and costs of repairing defects (RM20,000). The total amount of this counterclaim is RM116,630.

[29] On the site master I prefer the evidence of PW2 he had authorised the plaintiff to use it in order to speed up work. Although he had done so without DW4's authorisation this was explained as due to urgency and he was after all the project manager. Further it was the defendant evidence there was no reprimand of PW2 and no prior letters of demand for the return or rental. There was no police report despite the defendant saying it was because it didn't want any of the plaintiff's workers to be arrested and due to the long dealings between both parties.

[30] The claim for liquidated damages ('LAD') is premised on cl 11 of terms and conditions at the back of PO relating to delivery dates (B2 875), cl 6 of the additional terms and the letter of 5 August 2009. With regard to delivery dates DW1 stated this was to be found in Maxis KPI as with the term for LAD and its rate. DW2 also said the rates were to be found in the letter of 5 August 2009. DW3 who prepared the statement of accounts to include LAD had no personal knowledge as she said the information was from DW2.

[31] Clause 11 of terms and conditions in PO essentially states the delivery dates indicated shall be considered as of equal importance as the price and quality; failure to meet agreed delivery dates shall be considered a breach and seller agrees to pay buyer any penalty and damages imposed by buyer for failure to deliver on time. This clause is general and specific reference has to be made to Maxis KPI. The court had earlier found the additional terms to be between the defendant and Maxis with no record of it being given to the plaintiff and the letter of 5 August 2009 being issued after the completion of work. There was therefore no specified agreed term for LAD such that it cannot be imposed. Refer to *The PAM 2006 Standard Form of Building Contract* (Sundra Rajoo, WSW Davidson and Harbans Singh) where it is stated at pp 386–387:

... for a successful claim for such liquidated damages, it is trite ... to comply with the following typical pre conditions: (A) there must be included in the contract itself an express clause enabling the deduction of the liquidated damages;

...

- A (C) the details of the liquidated damages eg rate for the works (ie overall or sections) etc must be clearly indicated or filled in;
(E) there must be a definite date fixed contractually from which damages can run ...
....
- B [32] On defects it was DW2 evidence the amount of RM20,000 was in respect of eight sites where the punchlist was not cleared and referred to B1 279. He also said were no receipts as proof of rectification work done as a freelance contractor had been appointed and he was paid cash. From the evidence there was no proof adduced that this was the damages incurred by the defendant.
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- D [33] The defendant has pleaded in para 10 the plaintiff has not issued CN totaling RM146,437.65. DW3 prepared the statement of accounts at B2 848–849 and progressive certificates No 7–8. She explained the terms in the statement of accounts ‘Final measured amount based on final checklist quantity (RM)’ is the amount or price for the quantities of work actually done by the plaintiff; ‘Amount to be credited by CMP (RM) is the amount that the plaintiff should deduct and/or reimburse to the defendant because there is a price difference between the invoice’s price and the actual quantities of work done by the plaintiff; and ‘Net final measured work (RM) is the amount that should be paid to the plaintiff according to the terms of payment at the material time of filing the suit. She gave examples where the plaintiff’s invoice is wrong as in Q & A 10–31. The total amount of CN that the plaintiff ought to have issued is RM146,437,65. The plaintiff usually issued insufficient CN. In cross-examination she stated the statement of accounts was prepared based on the checklist. She was referred to the plaintiff’s email in B1 241 and asked if the defendant had replied on the sites in (14), (15), (17), (18), (21), (24), (25) and (28) she replied ‘no’. She agreed the invoices referred to in her Q & A 13, 15, 16, 17, 19, 20, 22, 23 and 27 were on work done at the site. For the site in respect of Q & A 30 CN was issued and there was no objection. There was also no objection to CN in B1 242, 245 and 248. On her evidence of insufficient CN she was referred to the plaintiff’s email in B 241 and asked if they had indicated which site required CN to which her answer was no. In re-examination she maintained the plaintiff had issued insufficient CN. The sites had CN but with an incorrect amount. She was not sure why there was no reply to B1 241.
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- I [34] DW1 was referred in cross-examination to B1 273 under the column ‘less CN overpaid’ and he said some were for checklist and some for double invoicing. He agreed the double invoicing had been revoked via CN H001 and there was no double invoicing. On the total amount of CN it was put the amount is RM107,204.70 and not the RM140,000 over he disagreed. He was shown an email in B1 241 and asked if there was any reply to say the figures

contradicted with the records he said he would not know. When asked again if the defendant had contradicted the email he replied that's why we issued certificate No 8 and he is not sure if his QS has contradicted earlier.

[35] From the evidence of DW1 there is no issue of double invoicing as he agreed it had been revoked by CN H001. For sites in respect of which DW3 said had been overclaimed or insufficient CN she stated there was no reply to the plaintiff's email in B1 241. This was an email from the plaintiff listing 16 sites and stating it will issue CN and for the defendant to reply if the figure given contradicts the defendant's records. There was no objection to the plaintiff's CN and no indication from the defendant indicating insufficient CN. The allegation of a meeting with plaintiff's representative in August 2008 where the representative had agreed to issue CN as the quantity of work was less than that stated in the invoices remain as mere allegations unsubstantiated by any documents.

[36] There was no proof the plaintiff had to issue CN totaling RM146,437.65.

CONCLUSION

[37] The plaintiff's claim of RM504,304.20 minus a set off of RM2,830, making it RM501,474.20 is allowed with 5% interest. The defendant's counterclaim is dismissed. Costs to the plaintiff.

Plaintiff's claim allowed for RM501,474.20 and counterclaim dismissed.

Reported by Ashok Kumar

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